Sprint Communications d/b/a/ Central Telephone Company of Texas *and* Communications Workers of America, Local 6174, AFL–CIO. Case 16–CA–21792–2, 16–CA–21858

December 13, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On December 9, 2002, Administrative Law Judge Keltner W. Locke issued the attached bench decision. The General Counsel and the Charging Party Communications Workers of America, Local 6174 (the Union) both filed exceptions and supporting briefs. The Respondent Central Telephone Company of Texas filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified, and to adopt the recommended Order.

At the close of General Counsel's case-in-chief, the judge granted the Respondent's motion to dismiss as to the allegations that the Respondent violated Section 8(a)(5) by: (1) failing to furnish "Personnel Action Forms" prepared in connection with the discharges of four union officers/employees; and (2) by instituting a change in the method of holding third-step grievance meetings such that the Respondent's employee relations specialist might participate via conference call, in addition to the physical presence of another management representative. In granting the Respondent's motion to dismiss, the judge found that (1) the "Personnel Action Forms" were not within the scope of information requested by the Union; and (2) the change concerning the physical presence of the employee relations specialist at third step meetings was not "material, substantial or significant" so as to create a duty to bargain. We agree with the judge and affirm his dismissal of these allegations.

With regard to the remaining allegation that the Respondent violated Section 8(a)(5) by failing to provide to the Union notes that the Respondent prepared during the course of its investigation into alleged misconduct by four union officers/employees, the judge held that the notes were protected from disclosure under the attorney work product doctrine. For the reasons explained below, we affirm the judge's dismissal of this allegation.

Factual Background

The Respondent's human resources specialist, Laura Hindman, received information from the Respondent's time keeper, Portia Welch, that Local Union President Glenda Turnbo had directed employees to engage in "self-help" action by staying on the time clock beyond working hours in protest of their not receiving their paychecks on time. Welch faxed Hindman a letter written by Turnbo to Bill Stubbs, the Respondent's employee relations manager, in which Turnbo warned Stubbs that the Union was directing unit employees who did not receive their paychecks on payday to stay on the clock until they did so. Welch also faxed Hindman the time records of a shop steward, which showed that he reported a significant amount of overtime hours on a single day, signaling that he had acted in support of Turnbo's directive. Hindman testified that the Respondent has a zero tolerance policy for the falsification of time records, and that the Respondent has terminated employees in the past for this offense. Upon initially learning of the alleged misconduct involving at least two union officials, Hindman contacted David Sapenoff, the Respondent's director of employee relations, and showed him the letter sent by Turbo. Hindman contacted Sapenoff directly because Stubbs, her manager, was unavailable at the time. Sapenoff immediately called Don Prophete, an attorney in the Respondent's in-house legal department who supervises other attorneys, for guidance. The contact with Prophete was not routine. Hindman testified that it was not routine for her to deal with Prophete. Rather, she usually dealt with attorneys who were subordinate to Prophete. The instant matter was dealt with on a higher level, i.e., by Director Sapenoff rather than by Hindman's manager Stubbs, and by Prophete rather than one of his subordinates.

As directed by Prophete, Hindman interviewed the four union officers/employees, as well as several other employees and managers. Hindman prepared statements for the four union officers/employees based on her notes and those of another human resources employee taken during the interviews. Hindman's notes contained not only factual information, but also her mental impressions of the witnesses' demeanors. She prepared a summary report and verbally reported the results of her investigation to Prophete. After Hindman completed the investigation, Sapenoff, Stubbs, and Hindman held a conference call with the field management team, as well as Prophete, in order to review Hindman's report and decide whether termination was appropriate. In consultation with Prophete and the human resources professionals, the field management team decided to discharge the four union officers/employees.

Hindman testified that she has routinely conducted investigations, but the type and magnitude vary considerably. She testified that she had only performed this type of full blown and complete investigation at the direction of the legal department. Such an investigation includes taking notes and preparing witness statements and a summary report. She has conducted investigations of this nature only once or twice in the past couple of years. Hindman further testified that it was not routine to discuss possible terminations with Prophete.

The Union requested a copy of Hindman's investigation notes in order to prepare for arbitration regarding the four discharges. The Respondent refused to provide the notes on the ground that the notes were protected from disclosure pursuant to the attorney-client privilege and work product doctrine. The Respondent did provide copies of the witnesses' signed statements to the Union in advance of arbitration.[1]

Discussion and Analysis

The work product privilege, which was first recognized by the Supreme Court over 50 years ago in *Hickman v. Taylor*, 329 U.S. 495 (1947), and later codified in Federal Rule of Civil Procedure 26(b)(3),[2] protects from disclosure written material prepared by a party or his representative in anticipation of litigation or for trial. The strong public policy underlying the work product doctrine is to aid the adversarial process by providing a certain degree of privacy to a lawyer in preparing for litigation. The *Hickman* Court reasoned that without such privacy,

> [m]uch of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Id. at 511. Further, in *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998), the D.C. Circuit stated that "[p]rotection is needed because an attorney preparing for trial must assemble much material that is outside the attorney client privilege, such as witness statements, investigative reports, drafts, pleadings and trial memoranda."

Rule 26(b)(3) was amended in 1970 to expressly extend work product protection to documents prepared in anticipation of litigation by or for a party representative, regardless of whether the representative is an attorney. Fed. R. Civ. P. 26(b)(3), advisory committee notes (1970 Amendment) (Subdivision (b)(3) of Rule 26 as amended "reflects the trend of the cases by requiring a special showing, not merely as to materials prepared by an attorney, but also as to materials prepared . . . by or for a party of any representative acting on his behalf.").

The work product privilege is not absolute. Rule 26(b)(3) provides that a party may obtain otherwise protected documents upon a showing that he "has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Fed. R. Civ. P. 26(b)(3). Even if such a showing is made, however, "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Id.

The essential question in determining whether a document qualifies as work product is "whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation."[3] *Senate of Puerto Rico v. U.S. Dep't of Justice*, 823 F.2d 574, 586 fn. 42 (D.C. Cir. 1987) (quoting 8 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2024 (1970)) (emphasis added). Work product protection will be accorded where a "document was created because of anticipated litigation, and would not have been created in substantially similar

[1] The Union asked for Hindman's report, and the Respondent declined to supply it, citing attorney-client privilege. That request is not alleged as unlawful.

[2] Federal Rule of Civil Procedure 26(b)(3) states in relevant part:

> [A] party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

[3] The "because of" test has been adopted by at least seven U.S. Circuit Courts of Appeal, including the D.C. Circuit. See *In re Grand Jury Subpoena (Mark Torf/Torf Environmental Management)*, 357 F.3d 900, 907 (9th Cir. 2004); *PepsiCo, Inc. v. Baird, Kurtz & Dobson LLP*, 305 F.3d 813, 817 (8th Cir. 2002); *State of Maine v. U.S. Dep't of Interior*, 298 F.3d 60, 68 (1st Cir. 2002); *Montgomery County v. MicroVote Corp.*, 175 F.3d 296, 305 (3rd Cir. 1999); *EEOC v. Lutheran Social Services*, 186 F.3d 959, 968 (D.C. Cir. 1999); *United States v. Adlman*, 134 F.3d 1194, 1195 (2nd Cir. 1998); and *Logan v. Commercial Union Ins. Co.*, 96 F.3d 971, 976–977 (7th Cir. 1996). This test is distinguished from the "primary motivation" test, recognized primarily by the Fifth Circuit, which asks whether the primary motivation behind a document's creation was to aid in anticipated litigation. *United States v. Davis*, 636 F.2d 1028, 1042 (5th Cir. 1981), cert. denied 454 U.S. 862 (1981).

form but for the prospect of that litigation." *Adlman*, 134 F.3d at 1195. In order to meet this standard, the party representative "must at least have had a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable." *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998). The prospect of litigation need not be actual or imminent; it need only be "fairly foreseeable." *Coastal States Gas. Corp. v. Dep't of Energy*, 617 F.2d 854, 865 (D.C. Cir. 1980). The privilege "extends to documents prepared in anticipation of foreseeable litigation, even if no specific claim is contemplated" at the time the documents are prepared. *Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992). Thus, it is not necessary for a specific claim to have been threatened or filed at the time of the document's creation, as long as the document was prepared in anticipation of foreseeable litigation. See, e.g., *In re Sealed Case*, 146 F.3d at 884 (finding documents prepared by outside counsel in response to news reports questioning the legality of the Republican National Committee's relationship with the National Policy Forum had been prepared in anticipation of litigation even though the Federal Election Commission had not yet filed a formal complaint); *EEOC v. Lutheran Social Services*, 186 F.3d at 968–969 (finding that an attorney's investigation report prepared in response to two anonymous memoranda accusing the organization's president of creating a sexually hostile work environment was protected work product even though no lawsuit had been filed at the time of its creation).

Applying these standards to the present case, we find that Hindman's investigation notes were prepared in anticipation of litigation and not in the ordinary course of business.[4] The fact that Hindman and Sapenoff immediately contacted the Respondent's in-house attorney upon receiving information about the alleged serious misconduct of the four union officers supports the Respondent's contention that it subjectively anticipated litigation. Furthermore, the Respondent's fear of litigation was objectively reasonable. In the world of labor relations, the discharge of four union officers, including the Local Union President, for actions taken in their capacity as union officials, would likely (albeit not inevitably) result in the Union's pursuing arbitration or filing an unfair labor practice charge. This is particularly true here where the Union would likely attempt to argue that the four union officers were engaged in protected, concerted activity in protest of the Respondent's failure to provide pay checks on time. And, of course, the Union did pursue arbitration with regard to each termination. Under these circumstances, the investigation notes, compiled by Hindman at the direction of the Respondent's in-house counsel in anticipation of foreseeable litigation, are plainly within the scope of the work product privilege.[5]

We do not dispute our dissenting colleague's contention that notes taken in the ordinary course of business do not fall within the ambit of work product protection. In sum, we simply disagree with his application of the law to the facts here. As indicated above, we find that Hindman's investigatory notes would not have been created in substantially similar form but for the prospect of litigation, and, hence, were not taken in the ordinary course of business. *Adlman*, supra. Hindman testified that she had conducted the type of extensive investigation involved in this case only once or twice before. As noted above, she further testified that in-house counsel, as opposed to her own manager, directed her to perform this investigation, and that it was not routine for her to discuss possible terminations with in-house counsel Prophete. Thus, this particular investigation was not a routine investigation done in the ordinary course of business, but rather was done in anticipation of litigation.

Our dissenting colleague also argues that because no articulable claim likely to lead to litigation had arisen at the time the notes were prepared, the work product privilege does not attach. In support, our colleague relies on the fact that the notes were prepared before the Respondent had terminated the four union officials/employees. While the fact that a specific claim has not arisen is a factor to consider in assessing whether a document was prepared in anticipation of litigation, it is not dispositive. *In re Sealed Case*, 146 F.3d at 887 (holding that "where . . . lawyers claim they advised clients regarding the risks of potential litigation, the absence of a specific claim

[4] We do not contend that, in the absence of possible litigation, there would have been no investigation. Rather, we contend that the scope and character of this particular investigation was because of the possibility of litigation.

As noted supra, the General Counsel does not challenge the Respondent's refusal to provide the Union with the report itself. That refusal was based upon the attorney-client privilege. And yet, the refusal to supply the notes, the very basis for the report, is the subject of the instant 8(a)(5) attack.

[5] We find that even if we were to apply the Fifth Circuit's primary motivation test, the result here would be the same. That is, even if an investigation would have been conducted for business reasons standing alone, the primary motivation for this investigation was the possibility of litigation. Hindman's investigation was performed at the direction of Attorney Sapenoff. Hindman testified that the investigation was more extensive than that typically performed by the Respondent and that she had not routinely performed this type of extensive investigation. As argued by the Respondent, it was keenly aware that litigation was a likely result should the Respondent decide to terminate the union officials' employment. Thus, we find that the primary motivation behind this extensive investigation was to aid the Respondent in the substantially likely event that the Union pursued litigation against the Respondent as a result of the discharges.

represents just one factor that courts should consider in determining whether the work-product privilege applies"). As the D.C. Circuit Court of Appeals has recognized, "[i]t is often prior to the emergence of specific claims that lawyers are best equipped either to help clients avoid litigation or to strengthen available defenses should litigation occur." Id. at 886. And as the Second Circuit Court of Appeals explained in *U.S. v. Adlman:*

> Although the non-occurrence of events giving rise to litigation prior to preparation of the documents is a factor to be considered, . . . it does not necessarily preclude application of the work-product privilege. For example, where a party faces the choice of whether to engage in a particular course of conduct virtually certain to result in litigation and prepares documents analyzing whether to engage in the conduct based on its assessment of the likely result of the anticipated litigation, we conclude[ ] that the preparatory documents should receive protection under Rule 26(b)(3).

134 F.3d at 1196; accord *Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124 (D.C. Cir. 1987) (IRS attorneys' memoranda analyzing expected legal challenges to a proposed system of statistical sampling was prepared because of anticipated litigation that would result from adoption of the program and was therefore protected work product). Thus, documents do not automatically lose their work product protection merely because no specific claim has yet arisen. Here, Hindman undertook the investigation at the direction of in-house counsel in order to inform the Respondent's decision whether to terminate the four union officials' employment. Such a business decision must weigh the risk of litigation. And, if the decision is to terminate the employees, that decision is likely to lead to litigation.

Moreover, our finding that Hindman's notes constitute protected work product serves the underlying purposes of the NLRA. As observed by the D.C. Circuit Court of Appeals, "[v]oluntary compliance with the law often depends on sound legal advice; sound legal advice in turn often depends on the attorney-client and work product privileges." *EEOC v. Lutheran Social Services*, 186 F.3d at 966. In finding documents prepared by outside counsel covered by the work product privilege even though a government agency had not yet filed a complaint, the D.C. Circuit further noted:

> [L]acking resources to pursue every suspected violation of federal law, the government must depend on effective, conscientious private lawyers to help clients comply voluntarily. . . . Weakening the ability of lawyers to represent clients at the preclaim stage of anticipated litigation would inevitably reduce voluntary compliance with the law, produce more litigation, and increase the workload of government law enforcement agencies.

In re Sealed Case, 146 F.3d at 887. Failing to recognize the status of the Respondent's notes as protected work product in this case would hinder the ability of lawyers to advise their clients regarding the prospect of litigation at the preclaim stage, and thereby undermine the important goal of fostering the peaceful resolution of labor disputes through voluntary compliance with the NLRA.

In order to overcome the work product protection, the Union had the burden of showing that it had a substantial need for the notes and that it could not obtain equivalent information without undue hardship. The Union has made no such showing. The Respondent provided the Union with copies of the witness statements in advance of arbitration. The Union has not shown that it was unable to pursue additional information by conducting its own witness interviews.[6]

Accordingly, we find that the investigation notes fall within the ambit of the work product privilege and the Union has not demonstrated the required "substantial need" in order to overcome the privilege.[7]

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. December 13, 2004

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting in part.

I agree with my colleagues that, for the reasons stated by the judge, the Respondent did not violate Section

[6] Assuming arguendo that *General Dynamics*, 268 NLRB 1432 (1984), represents extant Board law, and that it is appropriate to apply a balancing test where a party claims attorney work product privilege, an issue upon which we find it unnecessary to pass, we would nonetheless reach the same result. The General Counsel and the Union have not persuasively explained why the Union needs this information, clearly nondisclosable under Rule 26(b)(3), and why the witness statements provided did not satisfy the Union's needs. See *BP Exploration*, 337 NLRB 887 (2002) (where attorney-client privilege asserted, Board applied balancing test arguendo and found the respondent's confidentiality interest outweighed the union's asserted need).

[7] Given our finding that the notes constitute protected work product, we do not need to pass on the Respondent's other arguments that the notes are protected from disclosure pursuant to the attorney-client privilege or the Board's *Anheuser-Busch* doctrine.

8(a)(5) by its delay in the production of Personnel Action Forms requested by the Union in preparation for arbitration and by failing to have its human resources specialist physically attend a third step grievance meeting, and instead participate via teleconference, where another management representative was physically present at the meeting. However, I disagree with my colleagues' finding that the Respondent did not violate Section 8(a)(5) by failing to produce notes recording statements made by employees during interviews conducted as part of the Respondent's factual investigation into alleged misconduct of four union officers/employees.

By the Respondent's witnesses' own admissions, the interview notes were taken during a factual investigation that was conducted in the ordinary course of business for the nonlitigation purpose of determining whether the four union officials had engaged in the alleged misconduct so that the Respondent could decide the appropriate corrective action. In holding these notes to be protected work product, my colleagues disregard the universally followed principle that documents prepared in the "ordinary course of business" or for "other non-litigation purposes" are not protected work product. They thereby extend the work product doctrine beyond its intended scope and unjustifiably impair the ability of unions to protect their members' contractual and statutory rights.

Applicable Standards

The work product doctrine is embodied in Federal Rule of Civil Procedure 26(b)(3) and provides limited protection for materials prepared "in anticipation of litigation." Fed. R. Civ. P. 26(b)(3). The doctrine "is designed to balance the needs of the adversary system to promote an attorney's preparation in representing a client against society's general interest in revealing all true and material facts relevant to the resolution of a dispute." *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1371 (D.C. Cir. 1984). Because work product protection by its nature may hinder an investigation into the true facts, it must be narrowly construed consistent with its purpose. *Stout v. Illinois Farmers Ins. Co.*, 150 F.R.D. 594, 602 (S.D. Ind. 1993).

The party asserting work product protection bears the burden of establishing that the materials were prepared in anticipation of litigation. *In re Grand Jury Proceedings*, 156 F.3d 1038, 1042 (10th Cir. 1998); *Hodges, Grant & Kaufman v. U.S.*, 768 F.2d 719, 721 (5th Cir. 1985). In order for the work product privilege to attach, the prospect of litigation must be more than a mere possibility or contingency. *Binks Mfg. Co. v. National Presto Indus., Inc.*, 709 F.2d 1109, 1119 (7th Cir. 1983) ("The mere contingency that litigation may result is not determinative.") (quoting *Janicker v. George Washington University*, 94 F.R.D. 648, 650 (D.D.C. 1982)); *Nicklasch v. JLG Industries*, 193 F.R.D 570, 572 (S.D. Ind. 1999) ("There is consensus in the case law that the mere possibility of litigation is insufficient to warrant a reasonable anticipation of litigation."). Instead, the asserting party must generally show that "at the very least some articulable claim, *likely* to lead to litigation, had arisen" at the time the documents were prepared. *Binks Mfg. Co.*, 709 F.2d at 1119 (quoting *Coastal States Gas Corp. v. Dept. of Energy*, 617 F.2d 854, 865 (D.C. Cir. 1980)) (emphasis added); accord *Kent Corp. v. NLRB*, 530 F.2d 612, 623–624 (5th Cir. 1976) (finding that final investigative reports prepared by NLRB staff attorneys after investigation of unfair labor practice charges were protected work product since "the prospect of litigation was identifiable because of specific claims that had already arisen").

As my colleagues point out, there are essentially two standards that the federal courts of appeal have applied in determining whether the asserting party has met its burden of proving that the prospect of likely litigation caused it to prepare the withheld materials. The Fifth Circuit (the jurisdiction in which this case arose and the hearing took place) applies the "primary motivation" test. *United States v. El Paso Co.*, 682 F.2d 530, 542–543 (5th Cir. 1982). Under this standard, the work product doctrine applies only if the "primary motivating purpose behind the creation of the document was to aid in possible future litigation." Id. *(*quoting *United States v. Davis*, 636 F.2d 1028, 1042 (5th Cir. 1981), cert. denied 454 U.S. 862 (1981)). Other circuits apply a similar test that asks whether the documents were prepared "because of" existing or expected litigation. See, e.g., *EEOC v. Lutheran Social Services*, 186 F.3d 959, 968 (D.C. Cir. 1999); *U.S. v. Adlman*, 134 F.3d 1194 (2d Cir. 1998); *Binks Mfg. Co.*, 709 F.2d at 1119. Under this standard, the asserting party must establish that the document would not have been created "but for" the anticipated litigation. *Caremark, Inc. v. Affiliated Computer Services, Inc.*, 195 F.R.D. 610, 616 (N.D. Ill. 2000) ("If a document would have been created regardless of whether litigation was anticipated or not, it is not work product.").

Regardless of which standard is applied, all federal courts universally adhere to the mandate of Rule 26(b)(3) that documents "prepared in the ordinary course of business" or "for other non-litigation purposes" fall outside the work product privilege, even if those documents might ultimately be used to assist in litigation. Fed. R. Civ. P. 26(b)(3), advisory committee's note (1970 Amendment).[1] Such documents do not qualify for pro-

[1] Documents prepared in the ordinary course of business are "but one example of nonlitigation motivated documents." *Stout*, 150 F.R.D. at 594 fn. 9.

tection because it cannot be reasonably maintained that they were created for the purpose of anticipated litigation. Thus, the critical inquiry under the Rule is whether the document was produced for litigation or nonlitigation purposes. *Stout*, 150 F.R.D. at 599 ("[T]he standard against which documents are measured for work product protection is . . . whether they were produced for litigation or non-litigation purposes."); 8 Wright & Miller § 2024, at 346 (1970) ("[E]ven though litigation is already in prospect, there is no work-product immunity for documents prepared in the regular course of business rather than for purposes of the litigation.").

Accordingly, the mere fact that the party seeking work product protection foresaw litigation prior to investigating an accident or event does not qualify documents produced as a result of the investigation as protected work product. *Binks Mfg. Co., Inc.* 709 F.2d at 1119. Instead, the documents must have been produced for the purpose of the anticipated litigation. Thus, "[i]f in connection with an accident or an event, a business entity in the ordinary course of business conducts an investigation for its own purpose, the resulting investigatory report is producible in civil pre-trial discovery." Id. *(*quoting *Janicker*, 94 F.R.D. at 650).

For example, in *In re Leslie Fay Cos., Inc. Securities Litigation*, 161 F.R.D. 274, 280 (S.D.N.Y. 1995), the court held that documents prepared in connection with a company's investigation into the propriety of an audit it had performed were not protected work product. The court found that while the company could have reasonably anticipated litigation once the accounting irregularities were publicly disclosed, the company had not made a sufficient showing that the investigation documents were prepared "because of" the prospect of litigation. Instead, the court found that the company conducted the investigation primarily for business reasons, including to aid it in making decisions on firing responsible personnel. Id. at 280; accord *Seibu Corp v. KPMG LLP*, No. 3-00-CV-1639-X, 2002 WL 87461 (N.D. Tex. Jan. 18, 2002) (finding that internal investigation documents regarding the propriety of an audit performed by the firm were not created because of anticipated litigation, even though the investigation was initiated by the firm's in-house counsel, but instead were prepared for the primary purpose of making personnel decisions regarding the firm partners responsible for the audit).

Similarly, in *Miller v. Federal Express Corp.*, 186 F.R.D. 376, 387 (W.D. Tenn. 1999), the employer routinely investigated all internal job discrimination complaints under the direction of the employer's legal department. The court held that the documents generated during one such investigation and before the filing of a formal EEOC complaint were prepared in the ordinary course of adjusting employee complaints. The fact that the employer's corporate counsel instructed employees that the investigation was being launched in anticipation of litigation was insufficient to overcome the fact that the employer would have undertaken the investigation irrespective of the prospect of litigation. The court therefore held that the investigation documents were prepared in the ordinary course of business and not entitled to work product protection. Id.; accord *New England Telephone Co.*, 309 NLRB 558 fn. 1 (1992) (finding that the mere fact that the employer's security report could be used in litigation to defend the employer's decision to terminate an employee was insufficient to establish that the report was prepared in anticipation of litigation).

Application of Standards

Regardless of which of the above standards is applied, the Respondent did not present any evidence establishing that Hindman's investigation notes were prepared in anticipation of litigation. Neither Hindman nor Bill Stubbs, the Respondent's employee relations manager, who were the Respondent's only witnesses, mentioned a prospect of litigation at all in their testimony, much less that the investigation was undertaken because of it.[2] Far from establishing that Hindman's notes were created in anticipation of litigation, Hindman's and Stubbs' testimony compels a finding that the investigation was performed in the ordinary course of business for the nonlitigation purpose of determining whether the four union officials had engaged in the alleged misconduct so that the Respondent could determine whether termination was appropriate.

Specifically, Stubbs testified that the Respondent has "an internal process" whereby the Respondent's human resources department *always investigates* alleged misconduct by nonprobationary, unit employees. After the investigation is completed, the field management team makes the decision whether to terminate or discipline the employee. Stubbs testified that the management team always consults with the legal department, as well as the human resources department, in reaching this decision. Thus, the legal department's involvement in employee terminations is a routine part of the Respondent's internal procedure for dealing with allegations of misconduct by unit employees.

Similarly, Hindman testified that she always investigates alleged misconduct of any employee in the bargaining units for which she is responsible before the Respon-

[2] Moreover, the Respondent's in-house counsel did not testify at the hearing or present an affidavit regarding the purpose of the investigation.

dent decides whether termination is the appropriate action. She testified that she conducts these pretermination investigations at the direction of both the human resources and legal departments and that she "does everything in concert with their advice and direction." She testified that an investigation may entail as little as interviewing one person and taking notes or may be more extensive, as in this case, and involve interviewing many witnesses and preparing witness statements. She reports the results of an investigation to management and in-house counsel, and sometimes prepares an investigatory report summarizing the results. Hindman explained that whether she prepares a summary report depends on the size of the investigation, which in turn depends on the complexity of the issues involved and the number of individuals who need to be interviewed.

Consistent with the Respondent's internal policy and procedure for investigating alleged employee misconduct, Hindman testified that she conducted an extensive investigation in this case in order "to gather all the facts" so that they could "conclude what the proper, corrective action would be." She met with David Sapenoff, the director of employee relations, to discuss the information she had received from Portia Welch, the Respondent's time keeper, regarding the union officers' alleged involvement in falsifying time records. She and Sapenoff called Don Prophete, an attorney in the Respondent's in-house legal department, who told her to conduct an investigation in order "to determine what had, in fact, occurred." Prophete instructed her to interview witnesses and prepare statements for the four union officers. Hindman interviewed the four union officers as well as several other employees and managers, and took notes of what they said. She prepared statements for the union officers on the basis of the notes taken during their interviews. After completing the interviews, she prepared a written summary of her investigation. She, Sapenoff and Stubbs then held a conference call with the management team and in-house counsel Prophete. The group reviewed Hindman's report and decided to terminate the four union officials.

Based on the Respondent's witnesses' own admissions, it is incontrovertible that it is the Respondent's policy and procedure to always investigate alleged misconduct by any unit employee before making a termination decision. Hindman provided undisputed testimony that she conducted the investigation into the four union officers' alleged misconduct for the purpose of gathering all of the facts so that the Respondent could make a decision regarding the appropriate corrective action. It is also clear that the Respondent's in-house counsel is routinely consulted by the human resources department with regard to employee relations matters, advises and directs Hindman in handling allegations of employee misconduct, and is always involved in termination decisions. The Respondent presented no evidence that this investigation differed in any material respect from other investigations into alleged employee misconduct performed in the ordinary course of business. Most significantly, the Respondent presented no evidence to refute the nonlitigation, business purpose of the investigation identified by Hindman. Thus, it is clear from the record evidence that Hindman's witness notes were created during a factual investigation conducted in the ordinary course of business for the nonlitigation, business purpose of determining whether the four union officers had engaged in the alleged misconduct so that the Respondent could determine the appropriate corrective action. Accordingly, the investigation notes were not prepared "because of" litigation or for the "primary motivating purpose" of aiding in anticipated litigation, and therefore do not fall within the protection of the work product doctrine.

Based on this record, the majority concedes that the Respondent would have performed an investigation into the four union officers' alleged misconduct irrespective of a prospect of litigation. Nevertheless, the majority baldly asserts that "the scope and character of this particular investigation was because of the possibility of litigation." To support this argument, my colleagues rely on (1) their assertion that this investigation was "not routine" because of its "extensive" nature; (2) the fact that in-house counsel directed Hindman to conduct the investigation;[3] and (3) their assumption that the Union would likely, "albeit not inevitably," pursue litigation if the Respondent ultimately discharged the four union officials.

[3] In an apparent attempt to bolster their argument that the investigation was "not routine," my colleagues assert that Hindman testified that she "did not usually deal with Prophete" and that "it was not routine [for her] to discuss possible terminations with Prophete." The majority thereby seems to imply that it was unusual for her to deal with the Respondent's in-house attorneys generally. This is not the case. Hindman testified, as explained above, that she regularly consults in-house counsel on employee relations issues, and that she is directed by both the human resources and legal departments and therefore does "everything in concert with their advice and direction." In this particular case, she and Sapenoff contacted Prophete because, while she more regularly dealt with two other attorneys, Chris Pace and Tony Byergo, Sapenoff happened to deal more regularly with Prophete. Furthermore, Hindman did not testify that it was unusual for her to deal with Prophete. Hindman testified that with regard to possible terminations, she consults with Pace, Byergo, or Prophete, "depending on who's available." On this record, the fact that Hindman and Sapenoff contacted Prophete, as opposed to another attorney in the in-house legal department, does nothing to obviate the fact that in-house attorneys are routinely involved in employee misconduct investigations and decisions regarding appropriate corrective action.

The majority's argument is to no avail for several reasons.

First and foremost, the majority's decision ignores and contradicts Hindman's own testimony that the nonlitigation, business purpose of the investigation was to gather all of the facts so that the Respondent could determine whether to discharge the four union officials. Hindman in no way testified that "the scope and character of this particular investigation was because of the possibility of litigation." Hindman's unrefuted admission regarding the nonlitigation, business purpose of her fact investigation ends the work product inquiry.

Accordingly, my colleagues' reliance on Hindman's testimony that she had conducted investigations that were this extensive only once or twice before is misplaced. This is particularly true given Hindman's testimony that the purpose of her "extensive" investigations, like the one in this case, was to gather all of the facts so that the Respondent could determine the appropriate corrective action. The majority's argument misunderstands the work product standard as differentiating between frequent and infrequent activities, rather than between litigation and nonlitigation purposes. As explained supra, it is the purpose for which the interview notes were created that is the key inquiry under the work product rule, not whether the investigation entailed actions that were taken frequently or infrequently. *Stout*, 150 F.R.D. at 597 ("Although consideration of the producer's business or routine may be relevant under the Rule as evidence of the purpose or use for which the producer created the documents, the standard against which documents are measured for work product protection is not the nature of a document producer's business or the history of its internal procedures, but whether they were produced for litigation or non-litigation purposes.").

Here, even if one were to disregard Hindman's statements identifying the business purpose of her factual investigation, the record is clear that this investigation was performed in the ordinary course of business. As noted above, it is the Respondent's internal policy and process to always investigate alleged misconduct by any unit employee before a termination decision is made. The steps Hindman takes to investigate alleged misconduct vary depending on the complexity of the issues involved and the number of witnesses that need to be interviewed. For example, she may interview only one witness and take notes, or she may, as in this case, interview many witnesses, take notes, and prepare witness statements and a summary report. There is no record evidence to support the majority's apparent contention that investigations involving certain of these steps fall outside the Respondent's internal policy and process for investigating alleged employee misconduct or are conducted for purposes outside the ordinary course of business. Thus, the majority's argument that Hindman's investigation was not conducted in the ordinary course of business fails.

My colleagues' reliance on the fact that in-house counsel Prophete directed Hindman to conduct the investigation is also misplaced. As explained above, whether a document is protected under Rule 26(b)(3) depends on the purpose behind its preparation, rather than on the identity of the party representative who requests or prepares it. *Caremark, Inc.*, 195 F.R.D. at 615. Accordingly, it is well settled that investigation documents prepared in the ordinary course of business and/or for a nonlitigation purpose do not become protected work product by mere virtue of an attorney's direction of or involvement in the investigation. See, e.g., *Miller*, 186 F.R.D. at 387 (documents generated during investigation undertaken in the ordinary course of adjusting employee complaints were not work product despite the fact that corporate counsel directed the investigation); *Nicklasch v. JLG Industries, Inc.*, 193 F.R.D. at 573 (noting the "consensus in the case law that the involvement of an attorney is not enough to convey work product status" and finding that accident reports prepared at the direction of in-house counsel were not protected work product where the reports included no evaluation of the likelihood of litigation, and the manufacturer investigated the reported incidents as a matter of course in order to determine the causes of the accidents and possible corrections); *In re Kidder Peabody Secs. Litig.*, 168 F.R.D. 459 (S.D.N.Y. 1996) (holding that documents prepared by outside counsel during an investigation into misappropriated funds by one of the employer's major traders were not work product where the investigation was undertaken to find out what the trader had done and to help determine corrective action). Thus, Prophete's mere directing of Hindman to perform the investigation here, in the absence of any record evidence that the investigation was performed for the purpose of anticipated litigation, does not render her interview notes protected work product.

Moreover, my colleagues' reliance on the assumption that the Union would likely pursue litigation if the Respondent terminated the four union officials is also misplaced. There are innumerable business decisions, such as employee terminations, that may become the subject of future litigation. It is well established that this fact alone is not sufficient to bring documents relating to such decisions, like Hindman's interview notes, within the ambit of work product protection. Otherwise, any document which is later used to aid a party in litigation would be considered protected work product, regardless of the

purpose for which it was originally prepared. The work product doctrine does not sweep nearly this far. *Binks Mfg. Co.*, 709 F.2d at 1118 ("The mere fact that litigation does eventually ensue does not, by itself, cloak materials prepared by an attorney with the protection of the work product privilege; the privilege is not that broad."); *Coastal States Gas Corp.*, 617 F.2d at 865 ("To argue that every audit is potentially the subject of litigation is to go too far. While abstractly true, the mere possibility is hardly tangible enough to support so broad a claim of [work product] privilege.").

Finally, any prospect of litigation in this case was necessarily too far removed from Hindman's preparation of the interview notes because the event that could give rise to such a prospect—the termination of the four union officers—had not even occurred at the time Hindman conducted her investigation. Indeed, the purpose of the investigation was to determine whether to take that action. Thus, the Respondent cannot show that at least "some articulable claim, likely to lead to litigation had arisen" at the time the interview notes were created. *Coastal States Gas Corp.*, 617 F.2d at 865. This is not a case where the Respondent was investigating possible unlawful actions already taken by the four union officials in anticipation of filing a claim against them, or a case where the Respondent was investigating its own potentially unlawful conduct in anticipation of having to defend itself in future litigation. The Respondent simply cannot meet its burden of proof based on a mere contingency that litigation might result *if* the Respondent decided to terminate the four union officials as a result of its investigation. See, e.g., *Electronic Data Systems Corp. v. Steingraber*, No. 4:02 CV 225, 2003 WL 21653414 (E.D. Tex. July 9, 2003) (denying work product protection to documents prepared during a pretermination investigation into alleged employee misconduct because no articulable claim likely to lead to litigation arose prior to the employee's termination); *Pete Rinaldi's Fast Foods, Inc. v. Great American Ins. Cos.*, 123 F.R.D. 198, 202, 204 (M.D.N.C. 1988) (holding that "where an insured files a claim on its insurer, the insurer does not usually generate work product material until the claim is paid or denied"; "only when the company made a decision with respect to the claim would it have been possible for there to arise a reasonable threat of litigation so that information gathered thereafter might be said to be acquired in anticipation of the litigation").

Despite the above well-settled principles, my colleagues argue that the fact that no articulable claim had arisen at the time the interview notes were prepared is not dispositive because the notes were prepared to aid a business decision that was strongly influenced by the prospect of litigation and therefore constitute protected work product. However, the cases cited by the majority in support of this argument do not support such a broad proposition. In *U.S. v. Adlman*, the narrow issue addressed was "whether Rule 26(b)(3) is inapplicable to a *litigation analysis* prepared . . . in order to inform a business decision which turns on the party's assessment of the likely outcome of litigation expected to result from the transaction." 134 F.3d at 1197 (emphasis added). In that case, the Second Circuit found that an attorney's written legal analysis of potential claims that might result from a proposed merger would not have been produced but for the prospect of litigation and therefore was protected work product. Id.[4] In so holding, however, the Second Circuit emphasized that the attorney work product doctrine does not protect "documents that are prepared in the ordinary course of business or that would have been created . . . irrespective of the litigation." Id. at 1202. Similarly, in *Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124 (D.C. Cir. 1987), the court found that memoranda prepared by IRS attorneys analyzing expected legal challenges to the agency's proposed system of statistical sampling were prepared because of anticipated litigation that might result from adoption of the program and were therefore protected work product. In both of these cases, the very subject of the legal memoranda was the prospect of litigation. Therefore, the courts found that the memoranda would not have been prepared irrespective of the prospect of litigation. The present case, however, does not involve an attorney's legal analysis of potential claims that might result from the termination of the four union officials. Hindman's interview notes were prepared during an investigation undertaken for the purpose of determining *the facts* necessary for the Respondent to make a decision regarding appropriate corrective action; therefore, the notes would have been prepared irrespective of the prospect of litigation that might later develop as a result of making that business decision.[5]

[4] The Second Circuit rejected the Fifth Circuit's "primary purpose" test, explaining that, under this test, the subject legal analysis would not constitute protected work product because it was prepared primarily for a business purpose, i.e., to aid the company's decision whether to undertake the contemplated merger, rather than for the primary purpose of aiding in anticipated litigation.

[5] The majority notes that the General Counsel did not challenge the Respondent's refusal, on attorney-client privilege grounds, to provide the Union with Hindman's summary report, and then adds: "And yet, the refusal to supply the notes, the very basis for the report, is the subject of the instant 8(a)(5) attack." While not entirely clear, the majority's implied point seems to be that if Hindman's report is privileged, the notes used to prepare that report necessarily must be work product. But that conclusion does not follow. The attorney-client privilege protects confidential communications between clients and their attor-

In conclusion, the record evidence does not support the majority's conclusion that Hindman's interview notes were prepared in anticipation of litigation. To the contrary, the record testimony establishes that Hindman's interview notes were prepared during an investigation that was conducted in the ordinary course of business for the nonlitigation purpose of determining whether the four union officers had engaged in the alleged misconduct so that the Respondent could make a business decision—whether to terminate their employment. Thus, the Respondent failed to meet its burden of proving that Hindman's notes were prepared in anticipation of litigation. Accordingly, the Respondent violated Section 8(a)(5) by failing to produce the requested notes to the Union.[6]

Dated, Washington, D.C. December 13, 2004

Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD

Jamal Allan, Esq. and *Olivia Garcia, Esq.*, for the General Counsel

Ricardo Garcia, Esq. (Law Firm of David Van Os and Associates), of San Antonio, Texas, for the Charging Party

Anthony R. Byergo, Esq., of Overland Park, Kansas, for the Respondent

neys when the communications are for the purpose of securing legal advice. *In re Sealed Case*, 737 F.2d 94, 98–99 (D.C. Cir. 1984). Whether a communication is attorney-client privileged has no relation whatsoever to whether that communication was made in anticipation of litigation. Thus, assuming Hindman's report was privileged, that would have absolutely no bearing on whether the notes upon which the report was based were prepared in anticipation of litigation.

[6] The Respondent also argues that Hindman's notes are protected from disclosure under the attorney-client privilege and the Board's *Anheuser-Busch* doctrine. Neither theory is applicable. The attorney-client privilege protects only confidential communications between clients and their attorneys when the communications are for the purpose of securing legal advice. *See In re Sealed Case*, 737 F.2d at 98–99. As the judge noted, Hindman is not an attorney, or employed by legal counsel. Thus, her notes documenting communications with the interviewed employees are not subject to the attorney-client privilege. In *Anheuser-Busch Inc.*, 237 NLRB 982 (1978), the Board held that an employer was not obligated to turn over to the union "witness statements" which were otherwise relevant and necessary to enable the union to evaluate the merits of a grievance. The Board modified its *Anheuser-Busch* decision in *New Jersey Bell Telephone Co.*, 300 NLRB 42 (1990) by concluding that in order for a statement to constitute an excludable "witness statement," the witness must have adopted the statement. Because the witnesses in that case did not review the statements taken by the employer, and did not in any manner adopt them, the statements were not protected from disclosure under *Anheuser-Busch*. Here it is uncontested that the witnesses never reviewed or adopted Hindman's notes. Therefore, the notes are outside the scope of the protection given to witness statements.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on November 7, 2002, in San Antonio, Texas. After the parties rested, I heard oral argument, and on November 8, 2002, issued a bench decision pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1] The Conclusions of Law and Order provisions are set forth below.

CONCLUSIONS OF LAW

1. The Respondent, Sprint Communications d/b/a Central Telephone Company of Texas, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, Communications Workers of America, Local 6164, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate the Act in any manner alleged in the order consolidating cases, consolidated complaint, and notice of hearing (the "complaint").

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended.[2]

ORDER

The complaint is dismissed.

Dated Washington, D.C. December 9, 2002

APPENDIX A

BENCH DECISION

This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. In this case, the General Counsel alleges that Respondent unlawfully refused to provide the Union with the notes of an investigation it conducted concerning activities which led to the discharge of four employees. Concluding that the attorney work product doctrine privileges these notes from disclosure, I recommend that the Complaint be dismissed.

[1] The bench decision appears in uncorrected form at pages 222 through 231 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this Certification. On November 7, 2002, after the General Counsel had rested, Respondent moved to dismiss the Complaint. I granted that motion in part and denied it in part. My ruling on that motion appears in uncorrected form at pages 173 through 181 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as Appendix B to this Certification.

[2] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

Procedural History

This case began on March 15, 2002, when the Charging Party filed its initial charge in Case 16–CA–21792–2. On April 16, 2002, the Charging Party filed its initial charge in Case 16–CA–21858. On about June 28, 2002, after an investigation, the Regional Director of Region 16 of the National Labor Relations Board issued a Complaint and Notice of Hearing. On July 31, 2002, the Regional Director issued an "Order Consolidating Cases, Consolidated Complaint and Notice of Hearing," which I will call the "Complaint." In issuing this complaint, the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the "General Counsel" or as the "government."

Hearing opened before me in San Antonio, Texas, on November 7, 2002. On that day, after the General Counsel rested, Respondent moved to dismiss the Complaint. After considering the arguments of counsel, I partially granted that motion. Specifically, I dismissed the allegations raised by paragraphs 9(b), 11(b) and 12 of the Complaint. I denied the motion with respect to the allegations raised by paragraphs 9(a) and 11(a) of the Complaint.

Respondent then presented evidence concerning these allegations. At the conclusion of Respondent's evidence, on November 7, 2002, all parties presented oral argument. Today, November 8, 2002, I am issuing this bench decision.

Admitted Allegations

Based on the admissions in Respondent's Answer, I find that the charges were filed and served as alleged.

Further, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and that Employee Relations Manager Bill Stubbs and Employee Relations Specialist Laura Hindman are its supervisors and agents within the meaning of Sections 2(11) and 2(13) of the Act, respectively.

Additionally, based on Respondent's admissions, I find that the Charging Party is a labor organization within the meaning of Section 2(5) of the Act and, at all material times, has been the exclusive bargaining representative, pursuant to Section 9(a) of the Act, of a unit of Respondent's employees.

Moreover, I conclude that the unit represented by the Union, described in Complaint paragraph 6, is an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act.

Disputed Issues

Although certain legal issues are in dispute, this case is rather unusual because there are no credibility conflicts to resolve. The testimony of one witness does not contradict that of another. In describing the facts, I rely largely on the testimony of Laura Hindman, whom I credit based upon my observations while she testified.

Uncontradicted evidence establishes that Respondent discharged four employees, all of whom were officers of the Union. These include Union president Glenda Turnbo. Additionally, it is undisputed that Hindman, a staff member in Respondent's human resources department and an admitted supervisor and agent of Respondent, conducted an investigation before Respondent imposed this discipline.

In this investigation, Hindman interviewed the employees who were later discharged, as well as others, including both rank-and-file employees and members of management. She credibly testified, and I find, that an attorney in Respondent's legal department directed her to conduct the investigation, and that she reported the results of this investigation to this lawyer.

Respondent does not deny that by letter dated January 23, 2002, the Union requested that Respondent furnish it with a copy of the investigator's notes. Additionally, Respondent admits that it did not provide these notes. Rather, it denied the Union's request on the grounds that the notes were privileged from disclosure. Specifically, in a February 11, 2002 letter to a Union representative, an attorney in Respondent's law department stated, in part, as follows:

> Please note that Sprint considers these documents protected by the Attorney/Client Privilege and Work Product Doctrine. Consequently, Sprint is not obligated to provide you with information of this nature.

At hearing, the Respondent also asserted that the notes in question were protected from disclosure by the Board's *Anheuser-Busch, Inc.* [237 NLRB 982 (1978)] doctrine, under which an employer is not required to furnish a union with witness statements. Respondent argues that the investigator's notes serve the same function as witness statements because they memorialize what a witness stated. Therefore, Respondent contends, they deserve the same protection from disclosure.

It is not necessary for me to determine whether the attorney-client privilege or the Anheuser-Busch doctrine should apply because I conclude that the attorney work-product doctrine privileges the requested notes from disclosure.

As the name implies, the attorney-client privilege shields from disclosure communications between a lawyer and a client. Its application here would raise questions because Hindman is not an attorney. She testified that she is not admitted to practice law.

Moreover, Hindman interviewed a number of individuals who are rank and file employees, and not part of Respondent's management. The attorney-client privilege would not apply to such interviews because these individuals are not a client of the attorney for whom she was conducting the investigation. Indeed, some of them, namely the employees whom Respondent later discharged, would be adverse parties in any litigation arising from the termination of their employment.

The attorney work product doctrine may apply even when the attorney-client privilege does not. The Supreme Court recognized the work product privilege in *Hickman v. Taylor*, 329 U.S. 495 (1947). In that case the Court rejected "an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties."

The work product doctrine may also apply to work performed at a lawyer's direction and under the lawyer's supervision. For example, an attorney may hire a private investigator to ascertain the facts relevant to a particular case. If the lawyer

had done the investigating himself, his notes would be protected by the work product doctrine, and it is logical that an investigation performed by an assistant would enjoy a similar privilege.

The General Counsel contends that for the notes of a lawyer's investigator to fall within the attorney work product doctrine, the investigation must be conducted in anticipation of litigation. Respondent answers that the investigation in this case certainly comes within the meaning of the phrase "in anticipation of litigation" because the discharge of four union officers at one time almost certainly would result in an unfair labor practice complaint or some other kind of litigation. However, the present record establishes that Hindman conducted the investigation before Respondent made the decision to discharge the four individuals. Indeed, the purpose of the investigation was to allow the Respondent's lawyer to give advice to the management officials who would decide whether to take disciplinary action. Such advice presumably would include the lawyer's opinion regarding whether disciplinary action would violate the National Labor Relations Act.

It would be more appropriate to call the investigation one taken "in prevention of litigation" than one "in anticipation of litigation." However, I do not believe that this distinction makes the attorney work-product doctrine inapplicable. One of the most important functions of a lawyer - some would argue that it is the very most important function - is to give a client advice on how to comply with the law.

By counseling a client not to take an action which the attorney concludes is illegal, the lawyer furthers the purpose of the law and prevents the harm to society which a violation of the law would produce. An attorney cannot perform this beneficial function well without knowing all of the facts.

In doing such fact finding, the lawyer must, to some extent, assess the credibility of the various witnesses. Otherwise, the attorney will not be able to determine which witnesses are giving information most faithful to the truth. The attorney work product doctrine certainly protects a lawyer's own mental impressions from disclosure.

In this case the investigator testified that her notes included comments based on her observations of the witnesses. Thus, as the "eyes and ears" of the attorney, she was providing the lawyer with the sort of information which would fall within the work product doctrine.

When Respondent decided that it needed legal advice before taking disciplinary action, it had at least two alternatives. It could use an attorney employed in its own law department, or it could go to an outside law firm. If it had gone to an outside law firm, an attorney in that firm might have retained a private investigator to perform the investigation which Hindman actually conducted.

If a private investigator, acting under the direction of an outside lawyer, had conducted the investigation, I have little doubt that the investigator's notes would be protected by the work product doctrine. Should the result be different because the lawyer and investigator were full-time employees of Respondent?

Although Hindman previously had worked as a paralegal in Respondent's law department, she was, at the time of the investigation, working in the human resources department as an employment relations specialist. In conducting the investigation, however, she reported to a lawyer in the law department.

An in-house attorney performs essentially the same function, and is accountable to the judicial process under the same ethical standards as an attorney in an outside law firm. There is no logical reason to distinguish between a private investigator hired by an outside attorney, and a full-time employee "deputized" or "conscripted," as it were, to act as the investigator for an in-house attorney. Therefore, I conclude that Hindman's notes are just as entitled to the protection of the attorney work product privilege as would be the notes of a private investigator.

The privilege established by the attorney work product doctrine is not absolute. See generally, *Upjohn v. United States*, 449 U.S. 383 (1981). However, the General Counsel has not, in this instance, established facts which would overcome it.

The facts in this case are different from those in *National Football League Management Council*, 309 NLRB 78 (1992), in which the Board adopted without comment a judge's decision not to apply the work-product privilege to notes taken by an attorney during a meeting at which the respondent's executive committee discussed strategy for dealing with a strike. The evidence in this case leaves no doubt that the attorney ordered the investigation for a specific law-related purpose, namely, to obtain facts needed to advise his client regarding compliance with the National Labor Relations Act. Therefore, the National Football League Management Council case should be distinguished.

The General Counsel suggests that Respondent had a duty to provide the Union at the least with a redacted version of its notes. However, I do not believe that redaction would be a practical way of masking the impressions and observations and separating them from so-called "objective" facts. Merely identifying the witnesses contacted by the investigator would provide more than a clue as to the attorney's strategy if the matter came to litigation.

In this regard, I note that Board proceedings do not provide for routine pre-trial discovery. The investigation obviously had an objective of avoiding litigation before the Board, the logical forum for a complaint that an employer had discharged union officers unlawfully. Allowing the Union a look at the investigative notes therefore would provide a form of pretrial discovery to which it would not otherwise be entitled.

Having concluded that the work product privilege applies, I further conclude that Respondent did not violate the Act by refusing to furnish the Union with the notes. Therefore, I recommend that the Complaint be dismissed.

When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law, and Order. When that Certification is served upon the parties, the time period for filing an appeal will begin to run.

Thank you for the great courtesy and civility demonstrated by all counsel during this proceeding. The hearing is closed.

APPENDIX B

RULING ON RESPONDENT'S MOTION TO DISMISS

After the General Counsel rested, Respondent moved for dismissal of the Complaint. "In ruling on a motion to dismiss" under Board's Rules, Section 102.24, "the Board construes the complaint in the light most favorable to the General Counsel, accepts all factual allegations as true, and determines whether the General Counsel can prove any set of facts in support of his claims that would entitle him to relief." *Detroit Newspapers*, 330 NLRB No. 81, slip op. at 2 fn. 7 (2000).

The Consolidated Complaint, which I will refer to simply as the "Complaint," alleges that Respondent committed three separate violations of Section 8(a)(5) of the Act. Specifically, Complaint paragraphs 9(a) and 11(a), read together, allege that since about December 4, 2001, Respondent has failed and refused to provide to the Union its investigators' notes pertaining to the termination of four employees. That is the first alleged violation.

Complaint paragraphs 9(b) and 11(b), read together, allege that since about January 23, 2002, Respondent has failed and refused to provide the Union letters or forms reflecting authorizing signatures pertaining to the termination of four of Respondent's employees. That is the second alleged violation.

Complaint Paragraph 12 alleges that about February 1, 2002, Respondent changed the practice of holding third step grievance meetings in person. That is the third violation alleged.

The General Counsel's evidence establishes that on December 4, 2001, the Union was pursuing grievances on behalf of four employees whom Respondent had discharged. On that date, the Union requested in writing that Respondent provide certain specified information pertaining to those grievances.

One of the grievants was an employee named Ken Lloyd. The Union's December 4, 2001 information request on Lloyd's behalf sought, among other things, the following:

> Copies of the reports of the investigation as well as any statements made by Ken to the investigators, signed or unsigned. Copies of the investigator's notes and personal findings.

The Union requested that Respondent provide similar information for each of the other three grievants.

It is undisputed that Respondent did provide the Union with the witness statements requested. The Complaint does not allege that Respondent violated the Act by refusing to produce such witness statements. Rather, the controversy here concerns Respondent's refusal to furnish the Union with the notes taken by its investigators.

The Union continued to pursue its information request during the grievance procedure and, on January 23, 2002, a Union representative sent Respondent's employee relations manager, Bill Stubbs, a follow-up letter listing the information sought. On February 11, 2002, Attorney Chris R. Pace in Respondent's law department replied. The reply stated, in pertinent part, as follows:

> Bill Stubbs has provided me with a copy of your letter of January 23, 2002, in which you make five enumerated requests for information in connection with the terminations of Glenda Turnbo, Ken Lloyd, Kevin Scott and Wayne Moseley. Please note that Sprint considers these documents protected by the Attorney/Client Privilege and Work Product Doctrine. Consequently, Sprint is not obligated to provide you with information of this nature.

Respondent has not furnished the Union with the requested investigators' notes. I conclude that the requested information is relevant and necessary for the Union to perform its grievance representation functions. However, that does not decide the underlying issue, namely, whether or not the information is privileged from disclosure.

During the hearing today, Respondent argued that the attorney-client and attorney work product privileges apply. If I understand Respondent's arguments correctly, it also contends that the Board's Anheuser-Busch doctrine applies. Under that doctrine, an employer does not have to provide a Union with written statements which the employer has taken from witnesses. Respondent apparently contends that because the notes of its investigator memorialize information provided by a witness, the notes are tantamount to a written statement and should be afforded the same protection.

The General Counsel argued, in effect, that Respondent cannot shield the notes from disclosure under the Anheuser-Busch doctrine because Respondent already has turned over the statements themselves. However, the evidence does not disclose whether Respondent's investigators interviewed witnesses who did not give written statements. Therefore, I cannot assume that Respondent's production of the statements of some witnesses renders the Anheuser-Busch defense moot.

Both the attorney-client privilege and the work-product privilege are very important, and any assertion of these privileges must be considered carefully. See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383 (1981); *Patrick Cudahy, Inc.*, 288 NLRB 968 (1988). At the same time, an inappropriate extension of the privileges could deny a party to a collective-bargaining relationship the information it needs to perform its function, and thereby make it more difficult to fulfill the goals of the National Labor Relations Act. In these circumstances, any ruling which applies or denies the privileges would raise important policy issues which, ultimately, the Board must resolve. Therefore, it is important to develop for the Board a sufficient record.

The privileges protect from disclosure not only the communication made by a client directly to the attorney, but also certain communications made to an investigator who is working under the direction and control of the attorney. Thus, there is a possibility that an unduly broad application of the privileges would shield from disclosure even information which employers now routinely provide, on request, to unions representing their employees.

At this point, the record establishes only that Respondent's legal department and Respondent's human resources department were working together concerning the grievances in question. It does not show who directed the investigators. The record also does not reflect what individuals saw the investigators' notes and reports.

Thus, at this point, the record does not provide enough information to reach an informed conclusion concerning the ap-

plicability of the privileges to the requested documents. Therefore, I deny Respondent's motion to dismiss the first of the alleged violations.

The second alleged violation concerns the Union's request for information described as follows in the Union's January 23, 2002 letter: "Any letter or form that shows authorizing signature(s)."

The General Counsel asserts that because of this information request, Respondent had a duty to furnish the Union with a document entitled "Personnel Action Form" for each of the four grievants. Although Respondent ultimately provided these documents to the Union, the General Counsel asserts that Respondent's delay in doing so constitutes a refusal to bargain in good faith which violates Section 8(a)(5) of the Act.

Based on the evidence presented by the General Counsel, I conclude that the "Personnel Action Form" is not a document which falls within the Union's information request. The Union sought letters or forms which bore "authorizing signatures." Union Representative Parra's testimony establishes that the Union wanted documents bearing the signature of the management official who authorized the discharge of the four grievants. The Personnel Action Forms do not bear the signaures of the official or officials authorizing these actions, and the forms do not identify who those officials were.

It is true that the forms do bear some signatures, namely, of a supervisor and of someone in the human resources department. The General Counsel has not established that these individuals authorized the disciplinary actions being grieved.

If the Union had requested the "Personnel Action Form" for a grievant, Respondent would have been obligated to furnish it, because such a document, concerning a bargaining unit employee, is presumptively relevant. However, the Union's January 23, 2002 letter did not request the "Personnel Action Forms." Moreover, it may be noted that when Respondent ultimately learned that the Union did want copies of these documents, Respondent provided them.

Because the documents fall outside the scope of the January 23, 2002 information request, the Respondent's delay in providing them did not manifest bad faith or violate Section 8(a)(5) of the Act. Therefore, I grant Respondent's motion to dismiss the second unfair labor practice allegation.

The third unfair labor practice allegation concerns the physical presence of an official from Respondent's human resources department, which has its office in Overland Park, Kansas, at third step grievance meetings in Killeen, Texas. For financial reasons, Respondent decided that the human resources official would be present at the meeting by means of a telephone conference call, rather than "in the flesh." However, a management representative from the Killeen facility did attend the grievance meeting in person.

The evidence establishes that this indeed was a change from past practice, when the human resources representative from Overland Park had travelled to Texas for the meeting. The fact that Respondent made such a change, however, does not resolve the underlying issue, whether the change was lawful.

Generally, an employer has a duty to bargain with the exclusive representative of a unit of its employees before making a change in wages, hours, or other working conditions, but that duty arises only if the change is a "'material, substantial, and a significant' one affecting the terms and conditions of employment of bargaining unit employees." *Millard Processing Services, Inc*., 310 NLRB 421, 425 (1993), citing *Angelica Healthcare Services Group*, 284 NLRB 844, 853 (1987).

The General Counsel bears the burden of establishing that the change was material, substantial and significant. Viewing the evidence in the light most favorable to the General Counsel, I cannot conclude that the government has carried this burden.

The Union's president testified that there has been one third step grievance meeting using the conference call method. At the first of this meeting, there were problems in that individuals tended to interrupt each other, but the situation got better as the meeting progressed. The fact that the participants faced an initial difficulty in using the new method does not establish that the change was material, substantial or significant.

In some cases, a face-to-face meeting may be important. The Board, for example, discourages its judges from taking evidence from a witness over the telephone, because it believes the judge can better assess credibility by watching the witness's demeanor as he or she gives testimony. On the other hand, Board judges routinely use telephone conference calls to discuss matters relating to settlement and to legal issues in a case.

A third step grievance meeting does not involve a judge or arbitrator's assessment of credibility, and there is no obvious reason why one person's participation in that meeting by telephone would materially, substantially or significantly affect the Union's ability to represent the grievant. Even considering the evidence in the light most favorable to the General Counsel, I conclude that the change in question did not have any such material, substantial or significant effect. Therefore, I grant Respondent's motion to dismiss the third unfair labor practice allegation.

PROCEEDINGS

10:00 a.m.

THE COURT: On the record.

This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. In this case, the General Counsel alleges that Respondent unlawfully refused to provide the Union with the notes of an investigation Respondent conducting concerning activities which led to the discharge of four employees.

Concluding that the attorney work product doctrine privileges these notes from disclosure, I recommend that the complaint be dismissed.

Procedural history: This case began on March 15, 2002, when the Charging Party filed its initial charge in case 16–CA–21797–2. On April 16, 2002, the Charging Party filed its initial charge in case 16–CA–21858. On about June 28, 2002, after an investigation, the Regional Director of Region 16 of the National Labor Relations Board issued a complaint and notice of hearing. On July 31, 2002, the Regional Director issued an order consolidating cases, consolidated complaint, and notice of hearing, which I will call the complaint.

In issuing this complaint, the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the General Counsel or as the Government.

Hearing opened before me in San Antonio, Texas on November 7, 2002. On that date, after the General Counsel rested, Respondent moved to dismiss the complaint. After considering the arguments of Counsel, I partially granted that motion. Specifically, I dismissed the allegations raised by paragraphs 9(b), 11(b), and 12 of the complaint. I denied the motion with respect to the allegations raised by paragraphs 9(a) and 11(a) of the complaint.

Respondent then presented evidence concerning these allegations. At the conclusion of Respondent's evidence on November 7, 2002, all parties presented oral argument. Today, November 8, 2002, I am issuing this bench decision.

Admitted allegations: Based on the admissions in Respondent's answer, I find that the charges were filed and served as alleged. Further, I find that Respondent is an employer engaged in commerce within the meaning of Section 2.2(6) and (7) of the Act, and that employee relations manager Bill Stubbs and employee relations specialist Laura Hindman are supervisors and agents within the meaning of Sections 2.11 and 2.13 of the Act respectively.

Additionally, based on Respondent's admissions, I find that the Charging Party is a labor organization within the meaning of Section 2.5 of the Act, and at all material times, has been the exclusive bargaining representative pursuant to Section 9(a) of the Act of the unit of Respondent's employees.

Moreover, I conclude that the unit represented by the Union described in complaint paragraph 6 is an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act.

Disputed issues: Although certain legal issues are in dispute, this case is rather unusual because there are no credibility conflicts to resolve. The testimony of one witness does not contradict that of another. In describing the facts, I rely largely on the testimony of Laura Hindman, whom I credit based upon my observations while she testified.

Uncontradicted evidence establishes that Respondent discharged four employees, all of whom were officers of the Union. These include the union president, Linda Turnbo. Additionally, it is undisputed that Hindman, a staff member in Respondent's human resources department and an admitted supervisor and agent to Respondent, conducted an investigation before Respondent imposed this discipline.

In this investigation, Hindman interviewed the employees who were later discharged as well as others, including both rank and file employees and members of management. She credibly testified, and I find that an attorney in Respondent's legal department directed her to conduct the investigation, and that she reported the results of this investigation to this lawyer.

Respondent does not deny that by letter dated January 23, 2002, the Union requested that Respondent furnish it with the copy of the investigator's notes. Additionally, Respondent admits that it did not provide these notes. Rather, it denied the Union's request on the grounds that the notes were privileged from disclosure. Specifically, in a February 11, 2002 letter to a Union representative, an attorney in Respondent's law department stated in part as follows:

"Please note that Sprint considers these documents protected by the attorney/client privilege and work product doctrine. Consequently, Sprint is not obligated to provide you with information of this nature."

At hearing, the Respondent also asserted that the notes in question were protected from disclosure by the Board's Anheuser-Busch doctrine, under which an employer is not required to furnish a union with witness statements.

Respondent's argues that the investigator's notes served the same function as witness statements because they memorialize what a witness stated. Therefore, Respondent contends they deserve the same protection from disclosure.

It is not necessary for me to determine whether the attorney/client privilege or the Anheuser-Busch doctrine should apply, because I conclude that the attorney work product doctrine privileges the requested notes from disclosure. As the name implies, the attorney/client privilege shields disclosure -- shields from disclosure communications between a lawyer and a client.

It's application here would raise questions because Hindman is not an attorney. She testified that she is not admitted to practice law. Moreover, Hindman interviewed a number of individuals who are rank and file employees and not part of Respondent's management. The attorney/client privilege would not apply to such interviews, because these individuals are not a client of the attorney for whom she was conducting the investigation. Indeed, some of them, namely the employees whom Respondent later discharged would be adverse parties in any litigation arising from the termination of their employment.

The attorney/work product doctrine may apply even when the attorney/client privilege does not. The Supreme Court recognized the work product privilege in "*Hickman v. Taylor*," 329 US 495, 1947. In that case, the court rejected "an attempt without purported necessity or justification to secure written statements, private memoranda, and personal recollections prepared or formed by an adverve party's counsel in the course of its legal duties."

The work product doctrine may also apply to work performed at a lawyer's direction and under the lawyer's supervision. For example, an attorney may hire a private investigator to ascertain the facts relevant to a particular case. If the lawyer had done the investigating himself, his notes would be protected by the work product doctrine, and it is logical that an investigation performed by an assistant would enjoy a similar privilege.

The General Counsel contends that for the notes of a lawyer's investigator to fall within the work product doctrine, the investigation must be conducted in anticipation of litigation. Respondent answers that the investigation in this case certainly comes within the meaning of the phrase "in anticipation of litigation" because the discharge of four union officers at one time almost certainly would result in an unfair labor practice complaint or some other kind of litigation.

However, the present record establishes that Hindman conducted the investigation before Respondent made the decision to discharge the four individuals. Indeed, the purpose of the investigation was to allow the Respondent's lawyer to give advice to the management officials who would decide whether to take disciplinary action. Such advice presumably would in-

clude the lawyer's opinion regarding whether disciplinary action would violation the National Labor Relations Act.

It would be more appropriate to call the investigation one taken in prevention of litigation than one in anticipation of litigation. However, I do not believe that this distinction makes the attorney work product doctrine inapplicable.

One of the most important functions of a lawyer, some would argue that it is the very most important function, is to give a client advice on how to comply with the law. By counseling a client not to take an action which the attorney concludes is illegal, the lawyer furthers the purpose of the law and prevents the harm to society which a violation of the law would produce. An attorney cannot perform this beneficial function well without knowing all the facts.

In doing such fact-finding, the lawyer must, to some extent, assess the credibility of the various witnesses. Otherwise, the attorney will not be able to determine which witnesses are giving information most faithful to the truth. The attorney work product doctrine certainly protects a lawyer's own mental impressions from disclosure.

In this case, the investigator testified that her notes included comments based on her observations of the witnesses. Thus as the eyes and ears of the attorney, she was providing the lawyer with the sort of information which would fall within the work product doctrine.

When Respondent decided that it needed legal advice before taking disciplinary action, it had at least two alternatives. It could use an attorney employed in its own law department, or it could go to an outside law firm.

If it had gone to an outside law firm, an attorney in that firm might have retained a private investigator to perform the investigation which Hindman actually conducted. If a private investigator, acting under the direction of an outside lawyer, have -- had conducted the investigation, I have little doubt that the investigator's notes would be protected by the work product doctrine, should the result be different because the lawyer and investigator were full-time employees of Respondent.

Although Hindman previously had worked as a paralegal in Respondent's law department, she was, at the time of the investigation, working in the human resources department as an employment relations specialist. In conducting the investigation, however, she reported to a lawyer in the law department.

An in-house attorney performs essentially the same function and is accountable to the judicial process under the same ethical standards as an attorney in an outside law firm. There is no logical reason to distinguish between a private investigator hired by an outside lawyer and a full-time employee deputized or conscripted, as it were, to act as the investigator for an in-house attorney. Therefore, I conclude that Hindman's notes are just as entitled to the protection of the attorney work product privilege as would be the notes of a private investigator.

The privilege established by the attorney work product doctrine is not absolute. See generally "*Upjohn v. United States*," 449 US 383, 1981. However, the General Counsel has not, in this instance, established facts which would overcome it.

The facts in this case are different from those in "*National Football League Management Counsel*," 309 NLRB 78, 1992, in which the Board adopted without comment a judge's decision not to apply the work product privilege to notes taken by an attorney during a meeting at which the Respondent's executive committee discussed strategy for dealing with a strike.

The evidence in this case leaves no doubt that an—that the attorney ordered the investigation for a specific law-related purpose, namely, to obtain facts needed to advise its client regarding compliance with the National Labor Relations Act. Therefore, the National Football League Management Counsel case should be distinguished.

The General Counsel suggests that Respondent had a duty to provide the Union at least—at the least with a redacted version of its notes. However, I do not believe that redaction would be a practical way of masking the impressions and observations from so-called objective facts. Merely identifying the witnesses contacted by the investigator would provide more than a clue as to the attorney's strategy if the matter came to litigation.

In this regard, I note that Board proceedings to not provide for routine pre-trial discovery. The investigation obviously had an objective of avoiding litigation before the Board, the logical forum for a complaint that an employer had discharged union officers unlawfully. Allowing the Union a look at the investigative notes, therefore, would provide a form of pre-trial discovery to which it would not otherwise be entitled.

Having concluded that the work product privilege applies, I further conclude that Respondent did not violate the Act by refusing to furnish the Union with the notes. Therefore, I recommend that the complaint be dismissed.

When the transcript of this proceeding has been prepared, I will issue a certification which attaches as an appendix the portion of the transcript reporting this bench decision. This certification also will include provisions relating to the findings of fact, conclusions of law and order. When that certification is served upon the parties, the time period for filing an appeal will begin to run.

Thank you for the great courtesy and civility demonstrated by all counsel during this proceeding.

The hearing is closed.

(Whereupon, the proceedings were concluded at 10:15 a.m., November 8, 2002.)

CERTIFICATE

This is to certify that the attached proceedings before the National Labor Relations Board, Region 16, Case Name: Sprint Communications dba Central Telephone Company of Texas Case No.: 16–CA–21972–2 and 16–CA–21858 Location: San Antonio, Texas Date Held: November 8, 2002 was held according to the record, and that this is the original, complete, and true and accurate transcript that has been compared to the reporting or recording, accomplished at the hearing, that the exhibit files have been checked for completeness and no exhibits received in evidence or in the rejected exhibit files are missing, unless otherwise stated.